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Supreme Court, U.S.
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No.....

In The

Supreme Court of the United States

October Term, 1987

Norwest Bank Watertown, N.A.,
formerly First National Bank of Watertown;
Jerry Miller, Vice President of Norwest Bank
Watertown, N.A.; Thomas Green, Attorney for Norwest
Bank Watertown, N.A.

Appellants,

v.

Watertown Equipment Company and
Edward Moe, Jr.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE EIGTH CIRCUIT

JURISDICTIONAL STATEMENT OF APPELLANT THOMAS GREEN

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QUESTIONS PRESENTED

1. Were South Dakota's attachment statutes in effect in 1982 clearly unconstitutional?

2. Is an attorney who advises his clients of the possible unconstitutionality of state attachment statutes and then institutes attachment proceedings at the direction of his client acting under color of state law for purposes of Section 1983 liability?

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OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Eighth Circuit is reported at 830 F.2d 1487 (8th Cir. 1987) and reprinted in the Appendix at A-1 through A-15. The denial of Appellant Green's Petition for Rehearing En Banc is unreported. In granting Appellant Green summary judgment, the United States District Court for the District of South Dakota, Southern Division, did not issue a memorandum opinion.

JURISDICTION

This action under 42 U.S.C. § 1983 was brought by debtors against their creditor and the creditor's attorney alleging that the attachment of the debtors' property violated their due process rights, drawing into question the validity of the attachment statutes of the State of South Dakota, S.D. Codified Laws Ch. 21-17.[1]

The United States District Court of the District of South Dakota assumed jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C. § 1343. On November 25, 1985, the District Court, the Honorable John B. Jones presiding, granted summary judgment to Appellant Thomas Green on the basis that he was entitled to qualified or good faith immunity because South Dakota's attachment statutes were not clearly established to be unconstitutional at the time Green told his clients those statutes could possibly be unconstitutional and he instituted attachment proceedings at his client's direction. On October 6, 1986, the court, the Honorable Richard H. Battey presiding, entered an order granting summary judgment to the other Defendants in the action, again on the basis of qualified immunity.

Appellees filed a Notice of Appeal as to both summary judgments with the United States Court of Appeals for the Eighth Circuit on October 28, 1986. The jurisdiction of the Court of Appeals was invoked under 28 U.S.C. § 1291. On October 8, 1987, a three-judge panel of the Court of Appeals rendered an opinion and entered a

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[1]S.D. Codified Laws Ch. 21-17 was repealed in 1983. 1983 S.D. Sess. Laws ch. 168. The replacement statutes are not at issue in this action.

judgment reversing the District Court and remanding. The panel held that Green and the other Defendants were not entitled to immunity because the law clearly established the unconsitutionality of South Dakota's attachment statutes. The panel also held that fact questions existed as to whether Green acted under color of state law, precluding summary judgment on that ground.

All Defendants petitioned for rehearing en banc. On December 23, 1987, the Court of Appeals entered an order denying the petitions for rehearing. Four judges would have granted the petitions. Green filed Notice of Appeal on February 29, 1988. The jurisdiction of the United States Supreme Court to review the decision of the Court of Appeals on appeal is conferred by 28 U.S.C. § 1254(2).[2]

Because the proceeding draws into question the constitutionality of statutes of the State of South Dakota, namely, S.D. Codified Laws Ch. 21-17, and neither the State of South Dakota nor any agency, officer, or employee of the State is a party, it is noted that 28 U.S.C. § 2403(b) may be applicable. This proceeding originated in a court of the United States as defined by 28 U.S.C. § 451, namely, the United States District Court for the District of South Dakota, and no court of the United States has certified to the Attorney General of the State of South Dakota the fact that the constitutionality of S.D. Codified Laws Ch. 21-17 was drawn into question.

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[2]In the alternative, Appellant requests the Supreme Court to entertain this Jurisdictional Statement as a Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1). See 28 U.S.C. § 2103; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 470-71 (1985).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Due to the length of S.D. Codified Laws Ch. 21-17, the statutes involved in this case, they are set out in the Appendix at A-28 through A-43. *See* Sup. Ct. R. 15.1(f).

STATEMENT OF THE CASE

Beginning in 1976, Defendant Norwest Bank Watertown, N.A.,[3] (hereafter "Bank") entered into a series of loan transactions with Plaintiff Watertown Equipment Co. (hereafter "WEC"). Plaintiff Edward Moe, Jr., (hereafter "Moe") was WEC's majority stockholder. The Bank advanced WEC a general line of credit secured by a blanket security interest in WEC's inventory and receivables. WEC also had installment loans with the Bank.

WEC's line of credit consistently increased from 1976 through 1979. Sometime after the line of credit was extended to WEC, Moe signed a personal guaranty on WEC's loans and line of credit.

Beginning in 1978 and 1979, WEC began having difficulties meeting its payment obligations. By 1982, WEC had become seriously delinquent in repayment. As a result, demands were made upon Moe to make payment on his guaranty. These demands were ignored, although WEC made several small payments on its obligations in 1982. In June 1982, Bank personnel became seriously concerned about the deterioration of collateral. As a result, it began making frequent formal inspections of the

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[3]At the time of the events giving rise to this litigation, the Bank was First National Bank of Watertown.

equipment and collateral at WEC. Formal inventories were also conducted. In July 1982, the Bank decided to end further extensions or renewals of WEC's line of credit.

During that summer, Thomas Baxter, a senior loan officer of the bank, discovered equipment missing at WEC. Not only did the inspection reports indicate unaccounted for collateral, Baxter was told by Daniel Tobin, WEC's manager, just a few days prior to attachment that collateral was going to be moved and there were "a lot of funny things going on." Tobin wanted to alert Baxter "that they are going to take some of this stuff that you have floor planned out of here." Because of this loss of collateral, the Bank decided to pursue prejudgment attachment of the collateral.

In early October 1982, Defendant Jerry Miller, a Bank vice president, contacted Defendant Thomas Green (hereafter "Green") about WEC's delinquent loans. Green's law firm handled the Bank's legal matters. Miller told Green the Bank had reason to believe that on several occasions proceeds from the sale of inventory had not been applied to WEC's outstanding obligations. The two men discussed the possibility of using South Dakota's attachment procedures. Green informed Miller both orally and in writing that South Dakota's attachment law might be subject to constitutional attack as it had not been tested in the courts. On October 25, 1982, Green wrote Miller of the possible constitutional problems:

> We think it is important that the bank has a clear understanding in regard to our discussion concerning whether or not our attachment law is constitutional.

In 1969 in the case of *Syiadach v. Family Finance Corporation*, 395 U.S.337, [sic] the United States Supreme Court held that a Wisconsin statute, which authorized the garnishment of wages, before Judgment, constituted "a taking of property without that procedural due process that is required by the Fourteenth Amendment." [sic] and thus was unconsitutional. Since 1969 there have been many cases decided dealing with the constitutionality of garnishment laws, attachment laws, claim and delivery laws and other laws which generally allow a party to deprive another of property without notice and without an opportunity to be heard.

There have been several State Court decisions which have declared Attachment Laws, similar but not exactly the same as South Dakota's, as being unconstitutional. We can find no cases in South Dakota where the constitutionality of our Attachment Laws has been challenged and a review of cases where the Attachment Laws of other states have been challenged on constitutional grounds leads us to the conclusion that South Dakota's Attachment Law is distinguishable. There is some risk that Watertown Equipment Company could successfully attack the constitutionality of our attachment procedure. If it did successfully attack our law's constitutionality the bank could be liable for consequential damages Watertown Equipment Company might sustain as a result of First National's purusing its rights through attachment.

In all likelihood, since our Attachment Law has not been declared unconstitutional, the Trial Court

> or Circuit Court would uphold the constitutionality and any declaration of its unconstitutionality would more than likely be through appeal.

After Miller discussed these matters with the Bank's Discount Committee, the Committee decided to proceed with attachment. Green then prepared the necessary legal documents and WEC's property was levied upon and attached on October 25, 1982. Neither WEC nor Moe attempted to seek dissolution of the attachment or request a hearing to contest the grounds for attachment, as allowed by South Dakota law.

On August 21, 1984, Green was served with a summons and complaint in a 42 U.S.C. § 1983 action brought by WEC and Moe against the Bank, Miller and himself. The lawsuit claimed that the attachment violated procedural due process and that the Defendants acted with malice and lacked probable cause. In pendent state law claims, Plaintiffs alleged abuse of process, defamation and slander.[4] Green answered separately, affirmatively alleging, *inter alia*, the defense of qualified or good faith immunity.

Green moved for summary judgment on September 16, 1985. After briefing by the parties and a hearing on the motion, the District Court granted Green's motion for summary judgment. The District Court held that South Dakota's attachment law had never clearly been

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[4]The District Court granted Green summary judgment on those claims and that portion of the summary judgment was not raised by Plaintiffs in their appeal to the Court of Appeals.

established to be unconstitutional. As a result, the court ruled that Green was entitled to qualified or good faith immunity. The order granting Green's summary judgment motion was entered November 25, 1985. The District Court granted summary judgment to the Bank and Miller on October 6, 1986.

On October 28, 1986, Plaintiffs filed a Notice of Appeal with the United States Court of Appeals for the Eighth Circuit seeking review of both summary judgments.

The Court of Appeals reversed on October 8, 1987. A three-judge panel held that Green was not entitled to immunity because the law clearly established the unconstitutionality of South Dakota's attachment statutes. Although not raised or addressed by Green in his brief, the panel also held that a fact question existed as to whether Green was acting under color of state law. On October 29, 1987, Green petitioned for rehearing and rehearing en banc. On December 23, 1987, the Court of Appeals entered an order denying the petition. Four judges would have granted rehearing en banc.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

To be entitled to qualified or good faith immunity, a defendant in a 42 U.S.C. § 1983 action must show that he did not violate "clearly established" law of which he knew or should have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 813-14 (1982). Thus, the core question initially presented by this appeal is whether it was "clearly established" in 1982 that South Dakota's attachment law was unconstitutional.

Until this case, there were no court decisions on the constitutionality of S.D. Codified Laws Ch. 21-17. Therefore, guidance must be sought in the decisions of this Court on the constitutionality of creditor remedies statutes. Yet in seeking that guidance, it is important to recall that this area of the law has been "immersed in confusion," a confusion that "leaves counsel and the commerical communities in other States uncertain as to whether their own established and long-accepted statutes pass constitutional muster with the wavering tribunal off in Washington, D.C." *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 619 (1975) (Blackmun, J., dissenting).

Four decisions of this Court have shaped the boundaries on the constitutionality of creditor remedies law. *North Georgia Finishing, supra* (garnishment statute); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (sequestration statute); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (prejudgment replevin statutes); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (prejudgment garnishment statute). These cases fall short of presenting a seamless web for due process analysis of creditor's remedies. They can, however, be summarized as creating a totality of the circumstances approach focusing on five factors: (1) the existence of an affidavit supporting the attachment that contains facts averred to by a person with knowledge; (2) the opportunity for an early post-deprivation hearing where the creditor bears the burden of proving the grounds alleged in the writ; (3) the opportunity for the debtor to dissolve the attachment by filing a bond; (4) judicial participation in the issuance of the writ of attachment; and, (5) a requirement that the creditor indemnify the debtor for any wrongful taking.

See, e.g., Lewis Service Center, Inc. v. Mack Financial Corp., 696 F.2d 66, 68 (8th Cir. 1982).[5] The presence or absence of any one factor is not determinative. *Id.*

The panel of the Court of Appeals utilized these factors and held that South Dakota's attachment statutes comported with the first three. A-8-11. The panel's decision as to the remaining two factors, however, not only misconstrues the attachment statutes, it creates a conflict among the Courts of Appeals, at least in regard to the fourth factor.

Relying upon *Guzman v. Western State Bank*, 516 F.2d 125 (8th Cir. 1975), the Court of Appeals held that South Dakota law was constitutionally deficient because it did not require the active participation of a judge in approving the writ. A-11-12. It is true that South Dakota law did not mandate prior judicial approval. This alone, however, does not render the statutes constitutionally defective, especially in light of the other protections provided the debtor.

South Dakota law allowed for a neutral court officer, the clerk, to issue the writ of attachment and then only if presented with a proper affidavit and proof of the creditor's filing of an undertaking or bond. *See* S.D. Codified Laws § 21-17-3 (1967). Additionally, as the Court of Appeals recognized, the debtor could request an immediate post-deprivation hearing, something that ameliorates any alleged deficiency in judicial supervision. In this regard, it is significant that the debtor here never

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[5]*Lewis* was decided two months after the attachment at issue in this case.

requested such a hearing or dissolution of the attachment. "The debtor in this case, who did not avail himself of this opportunity [to seek a hearing], can hardly expect that his argument on the severity of deprivation will carry much weight[.]" *Mitchell, supra*, 416 U.S. at 610.

Moreover, as Justice Powell stated:

> I am not in accord with the Court's suggestion that the Due Process Clause might require that a *judicial* officer issue the writ of garnishment. The basic protection required for the debtor is the assurance of a prompt postgarnishment hearing before a judge. Such a hearing affords an opportunity to rectify any error in the initial decision to issue the garnishment. When combined with the availability of the garnishor's bond to compensate for any harm caused, the possibility of prompt correction of possible error sufficies to satisfy the requirements of procedural due process in thiscontext. It thus should be sufficient for a clerk or other officer of the court to issue the original writ upon the filing of a proper affidavit.

North Georgia Finishing, 419 U.S. at 611 n.3 (Powell, J., concurring) (emphasis in original). *See also Id.* at 625-26 ("The clerk-judge distinction . . . surely is of little significance so long as the court officer is not an agent of the creditor.") (Blackmun and Rehnquist, JJ., dissenting).

The Court of Appeals, however, took the position that the clerk-judge distinction is significant. In so doing, it aligned itself with the Fifth Circuit Court of Appeals, which has found a lack of judicial supervision fatal to the constitutionality of an attachment statute. *Johnson v.*

American Credit Co., 581 F.2d 526, 534-35 & n.16 (5th Cir. 1978). Other circuits, however, disagree. *See, e.g., Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 639 (9th Cir. 1982) (lack of prior judicial approval not fatal to maritime attachment procedure); *Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion*, 773 F.2d 1528, 1538 (11th Cir. 1985) (en banc) (same); *Brown v. Liberty Loan Corp.*, 539 F.2d 1355 (5th Cir. 1976), *cert. denied*, 430 U.S. 949 (1977) (upholding Florida postjudgment wage garnishment statutes even though they allowed writ to be issued by clerk of courts); *Jonnet v. Dollar Savings Bank,* 530 F.2d 1123, 1130 n.15 (3d Cir. 1976) (upholding Pennsylvania foreign attachment statutes despite fact writ could be issued by clerk of courts).

Thus, not only is there disagreement among the members of this Court on whether a judge must issue the writ, there is a conflict among the Courts of Appeals.

The Court of Appeals below went on to hold that even if lack of a judge's involvement did not condemn South Dakota's attachment statutes, the statutes were clearly unconstitutional in 1982 when that fact was combined with the "wholly inadequate" creditor's bond. A-12. This conclusion, however, ignores the fact that South Dakota law provides for full liability regardless of the bond where malice or lack of probable cause is alleged and shown. *Slaughter v. Nolan*, 41 S.D. 134, 169 N.W. 232 (1918). Plaintiffs' Amended Complaint made both allegations and, therefore, under the law existing in 1982 Plaintiffs could seek full indemnification.

Moreover, it must again be noted that a debtor could seek dissolution of the attachment through a hearing or

obtain release of the property through the posting of a bond. S.D. Codified Laws §§ 21-17-22 to -29 (1967). WEC and Moe made no attempt whatsoever to seek dissolution through either option, an undisputed fact entirely unmentioned by the Court of Appeals. As already noted, a debtor who does not avail himself of such an opportunity "can hardly expect that his argument on the severity of deprivation will carry much weight[.]" *Mitchell, supra*, 416 U.S. at 610.

Again, the final analysis is whether South Dakota's attachment statutes were clearly established to be unconstitutional in October 1982. As the Eighth Circuit itself said recently:

> The qualified immunity defense fails when the official acts in a manner that disregards undisputed constitutional guarantees. . . . . Moreover, the official could not have "known" that his conduct would violate the law *unless that conduct has been identified as unlawful. Thus, an official does not forfeit his immunity because he "gambled and lost on the resolution of [an] open question.*"

Arcoren v. Peters, 829 F.2d 671, 673 (8th Cir. 1987) (en banc) (quoting *Mitchell v. Forsyth*, 472 U.S. 511 (1985)) (other citations omitted) (emphasis added). Granted, there may have been questions regarding the constitutionality of S.D. Codified Laws Ch. 21-17, questions identified by Green. The law was not, however, "identified as unlawful" until the panel opinion of October 8, 1987, nearly five years *after* the attachment of Plaintiffs' property. It is difficult to conceive that the law was "clearly established" when it took Plaintiffs 21 pages of their appellate brief and the Eighth Circuit panel more

than half of its lengthy opinion to explain that the attachment scheme was unconstitutional.

II.

In his appellate brief, Green argued that he was entitled to good faith immunity because his actions consisted of advising his client and instituting the attachment proceedings at his client's direction. The panel of the Eighth Circuit said this raised the question of whether Green acted under color of state law, A-21, an issue not addressed by Green in his brief. The panel held fact questions existed on this point and reversed and remanded, A-22.

This Court has held that private individuals who jointly participate with state officials in seizing property under prejudgment attachment statutes are state actors and acting under color of state law. *Lugar v. Edmondson Oil Co.*, 467 U.S. 922, 939-43 (1982). However, only the creditor corporation and its president were named defendants in *Lugar. Id.* at 925. As a result, it does not address whether a private attorney who merely advises his client and institutes proceedings at his client's request is a private party who jointly participates with state officials.

Under *Lugar*, a person may be said to be a state actor "because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." *Id.* at 937. Here, Green's actions consisted of advising his client and then instituting proceedings at the client's request. As such, Green was performing a lawyer's traditional function as counsel. *Cf. Polk County v. Dodson,* 454 U.S. 312, 325 (1981). Moreover, Green clearly was acting within and

adhering to his ethical obligations. *See, e.g.*, Model Code of Professional Responsibility EC 7-3 ("In serving a client as adviser, a lawyer in appropriate circumstances should give his professional opinion as to what the ultimate decisions of the courts would likely be as to the applicable law"); EC 7-4 ("The lawyer may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail"); EC 7-5 ("A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand, and by informing his client of the practical effect of such decision"); EC 7-7 (with certain exceptions "the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer").

Additionally, as this Court has noted, "the Courts of Appeals are agreed that a lawyer representing a client is not, by virtue of being an officer of the court, a state actor 'under color of state law' within the meaning of § 1983." *Polk County*, 454 U.S. at 318. The Eighth Circuit is one of those courts. It has consistently held that attorneys whose only conduct is in representing clients do not act under color of state law. *See, e.g., Chapman v. Musich,* 726 F.2d 405 (8th Cir. 1984) (public defender); *Chambers v. Kaplan*, 648 F.2d 1193 (8th Cir. 1981) (private attorney appointed to represent prison inmates in class action litigation); *Lamb v. Farmers Insurance Co.*, 586 F.2d 96, 97 (8th Cir. 1978) ("the conduct of counsel in representing clients does not constitute action under color of state law"); *Sebastian v. United States*, 531 F.2d 900 (8th Cir. 1976) (same). The only Eighth Circuit case that appears to deviate from this rule is *Buller v. Buechler,* 706 F.2d 844

(8th Cir. 1983). It is this case upon which the panel below relied. A-21.

In *Buller*, a farm debtor brought a Section 1983 action against his creditors and the creditors' attorney alleging his procedural due process rights were violated when the proceeeds of an auction sale were garnished under South Dakota law. 706 F.2d at 845-46. As noted by the panel below, the *Buller* court said it was possible the creditors' attorney could be liable because he caused the proceedings to be instituted, was in a better position to know whether the law was constitutional,[6] possibly refused to comply with his client's request to release the debtor's property and had a monetary stake in the use of garnishment proceedings. 706 F.2d at 852.

This discussion, however, came in the context of the *Buller* attorney's claim that he was entitled to qualified or good faith immunity. *Id.* at 852-53. It does not resolve the question presented in this case, one that is an open and unanswered.

To date, this Court has held that only where the plaintiff alleges intentional misconduct and conspiratorial action with state officials on the part of the attorney is a factual issue created with regard to whether the attorney acts under color of state law. *Tower v. Glover*, 467 U.S. 914 (1984). Here, the Plaintiffs' Amended Complaint contained no such allegations. This case presents the important question of whether an attorney who advises his client on the constitutionality of a statute where there

[6]Unlike the situation presented here, South Dakota's garnishment statute had been declared unconstitutional by a federal district court six years prior to the *Buller* garnishment. 706 F.2d at 846.

is no controlling case law and then adheres to his client's request to institute proceedings under that statute acts under color of state law in performing his ethical duties to his client. This Court needs to address the question of whether an attorney's actions in merely advising his client and instituting proceedings at the client's direction is sufficient conduct to constitute action under color of state law.

CONCLUSION

The questions presented by this appeal are substantial and unresolved, thereby requiring plenary consideration by this Court for their resolution.

Respectfully submitted,

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March 22, 1988

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5448

Watertown Equipment Company and
Edward Moe, Jr.,

Appellant,

v.

Norwest Bank Watertown, N.A.,
formerly First National Bank of Watertown;
Jerry Miller, Vice President of Norwest Bank
Watertown, N.A.; Thomas Green, Attorney
for Norwest Bank Watertown, N.A.,

Appellees.

Appeal from the United States District Court for the
District of South Dakota.

Submitted: June 12, 1987
Filed: October 8, 1987

Before LAY, Chief Judge, HEANEY, Circuit Judge, and
LARSON,* Senior District Judge.

HEANEY, Circuit Judge.

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*The HONORABLE EARL R. LARSON, Senior United States District Judge for the District of Minnesota, sitting by designation.

Appellants Watertown Equipment Company and Edward J. Moe bring this 42 U.S.C. § 1983 action against appellees Norwest Bank of Watertown, its vice president, Jerry Miller, and its attorney, Thomas Green. The appellants claim that the appellees violated their rights to procedural due process by attaching property of Watertown Equipment Company under a South Dakota attachment statute. The district court granted summary judgment for each appellee, holding that each had qualified immunity from liability. We reverse and remand.

I. BACKGROUND.

Appellant Moe was the majority stockholder of three farm implement dealers, Watertown Equipment Company in Watertown, South Dakota, and two others in Dawson and Appleton, Minnesota. From 1976 to 1982, Norwest Bank of Watertown (then First National Bank of Watertown) extended a general line of credit to Watertown Equipment which was secured by an interest in Watertown Equipment's inventory and receivables. Moe also personally guaranteed most of the loans. Altogether, Watertown owed Norwest about $488,000 on the loans.

Beginning in 1978, Watertown Equipment had difficulties meeting its loan obligations. Norwest and Moe tried to work out the difficulties. Norwest helped Moe list for sale a plot of about 180 acres which Watertown Equipment owned to finish payment on a mortgage and to help reduce the amount owing on the loans.

In 1982, Watertown Equipment's financial state worsened. Norwest made frequent demands on Moe for payment, but Moe was only able to make several small payments in 1982. In the spring of 1982, Norwest required monthly and even weekly formal inventories at Watertown Equipment. By summer, Norwest decided to cut Watertown Equipment's line of credit. At this time, Norwest also claims to have discovered equipment missing from the dealership. According to Norwest, the manager of Watertown Equipment, Dan Toben, also warned Norwest that some of the collateral was going to be moved out of the state. In his affidavit, however, Toben stated that he never told this to Norwest, and, in fact, he said that Watertown Equipment had often moved equipment to one of Moe's other dealers and that its behavior in the six months prior to the attachment was no different than it had been in the past. Moe stated that Norwest was aware of such transfers in the past.

Norwest's vice president, Jerry Miller, claims that Norwest began to consider prejudgment attachment upon the suggestion of its attorney, Thomas Green, because of movement of equipment out of the state and possible concealment of proceeds from sales. In early October of 1982, Miller more fully discussed the use of prejudgment attachment proceedings with Green. In a letter of October 25, 1982, Green cautioned that the South Dakota attachment statute in effect at that time[1] might be unconstitutional, although his research of the case law

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[1]In 1983, the South Dakota Legislature repealed S.D. Codified Laws Ch. 21-17 and replaced it. *See* Ch. 21-17A (1987). The holding in this case only concerns Ch. 21-17.

construing attachment statutes in other states led him to the conclusion that the South Dakota law was "distinguishable." Miller discussed the matter with Norwest's Discount Committee which decided to undertake the attachment. Green prepared the necessary papers, and, on October 25, 1982, Norwest secured an order from the clerk of court of Codington County. Pursuant to the writ of attachment, the sheriff arrived at Watertown Equipment, told all the employees to leave, and secured the building and all the equipment in it by changing the locks. After several months while the business was still under the attachment, Norwest and Watertown Equipment reached a settlement agreement. Watertown Equipment apparently was closed as a result.

The appellants instituted this action and pendent state claims in federal district court. On November 27, 1985, the district court granted summary judgment for appellee Green. On October 6, 1986, the district court granted partial summary judgment for appellees Norwest Bank and Miller on the section 1983 claim and dismissed the state claims without prejudice.

II. DISCUSSION.

This appeal presents three issues: whether qualified immunity generally protects the appellees from liability in this case; whether Norwest's and Miller's reliance on Green's advice as an attorney insulates them from liability; and whether Green's participation in the attachment was sufficient to be under color of state law.

Initially, it should be pointed out that an action under 42 U.S.C. § 1983 lies when a plaintiff establishes that a defendant acting under color of state law has deprived the

plaintiff of a right secured by the Constitution or federal law. *See Buller v. Buechler*, 706 F.2d 844, 846-47 (8th Cir. 1983) (citing *Flagg Brothers, Inc., v. Brooks*, 436 U.S. 149, 155-56 (1978)). The right allegedly deprived in this case is the right to due process of law guaranteed by the fourteenth amendment. The action under color of law is present because private parties acting pursuant to state attachment statutes such as this one have been held to act under color of state law. *See Lugar v. Edmonson Oil Co., Inc.*, 457 U.S. 922 (1982).

A. Qualified Immunity Under Attachment Statute.

In a suit under section 1983, a public official performing a discretionary function has qualified immunity from liability. *Mitchell v. Forsyth*, 472 U.S. 511, 86 L.Ed.2d 411 (1986). The protection of qualified immunity has been extended by this Court to private individuals who act in joint participation with public officials acting pursuant to creditor remedies statutes. In *Buller v. Buechler,* 706 F.2d at 850, we held that private individuals acting pursuant to a North Dakota garnishment statute were entitled to the same qualified immunity as public officials. Because we can find no substantive distinction between an action under the garnishment statute in *Buller* and under the attachment statute here, we hold that each appellee here is entitled to invoke the defense of qualified immunity.

To gain the protection of qualified immunity, the defendant must show that he or she did not violate clearly established law of which he or she knew or should have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 813-14 (1982); *see also Arcoren v. Peters*, No. 86-5119, slip op. at 3 (8th Cir. September 25, 1987) (en banc). Law is not clearly

established when there is a "legitimate" or "open" question as to the legality of conduct. *Mitchell*, 472 U.S. 511, 86 L.Ed.2d at 430-31 & n.12. The standard is generally an objective one, *Harlow*, 457 U.S. at 818, and presents a question of law which can usually be disposed of at the summary judgment stage. *Id.* The defendant bears the burden of proving that the law was not clearly established at the time the alleged violation occurred. *Id.* at 808.

As the following review of the case law confirms, on October 25, 1982, the law clearly established the unconstitutionality of the South Dakota statute. Four Supreme Court cases have shaped the contours of the constitutionality of creditor remedies statutes. In *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969), the Supreme Court declared that a Wisconsin prejudgment garnishment statute violated the "fundamental principles of due process" because it did not provide for notice and a hearing prior to the deprivation of wages. *Id.* at 342. A few years later in *Fuentes v. Shevin*, 407 U.S. 67 (1972), the Supreme Court concluded that the Florida and Pennsylvania prejudgment replevin statutes, under which actions for repossession of a gas stove, stereo, bed, table, and other household goods occurred, violated due process. Moreover, the Court stated that, absent extraordinary circumstances, before a debtor could be deprived of a significant property interest, he or she must be notified and given the opportunity to contest the creditor's claim. 407 U.S. at 82.

In *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974), however, the Supreme Court upheld the constitutionality of a Louisiana sequestration statute even though it did not provide notice and a hearing before a refrigerator, a range, a stereo, and a washing machine were sequestered.

The *Mitchell* decision emphasized that the creditor also had a property interest in the sequestered property and that, after weighing the competing interests of the creditor and the debtor, the procedural safeguards in the Louisiana statute provided the debtor sufficient due process after the deprivation. The procedural safeguards in the Louisiana statute were a factually detailed affidavit to be filed with the writ, the posting of an adequate creditor's bond, return of the property by the posting of a debtor's bond, an immediate post-deprivation hearing, creditor's liability for a wrongful attachment, and judicial supervision of the entire process. *Id.* at 608-10. The Supreme Court emphasized that the "requirements of due process of law 'are not technical,'" and that a court must consider a creditor remedy scheme "as a whole." *Id.* at 610.

Finally, in *North Georgia Finishing, Inc., v. Di-Chem, Inc.*, 419 U.S. 601 (1975), the Supreme Court, relying on *Fuentes*, struck down a Georgia statute which permitted garnishment of a business's bank account without notice or a hearing. The procedural safeguards in the statute were insufficient because they did not provide for judicial supervision, a factually complete affidavit, or an early hearing. *Id.* at 607.

This Court in 1975, in *Guzman v. Western State Bank of Devils Lake,* 516 F.2d 125 (8th Cir. 1975), considered the attachment of a mobile home under North Dakota's attachment statute. In accordance with the decision in *Mitchell,* we recognized that where the creditor has a legitimate interest in a prejudgment remedy, the necessary procedural safeguards in a given case are determined by

> comparing the extent to which they further the defendant's interest in avoiding a wrongful or arbitrary deprivation of his property with their negative effect upon the interest of the state in providing protective creditor remedies. If, on the balance, the potential for harm to the defendant under the state-adopted procedure is slight, in light of substantial advancement of a legitimate state interest in providing ex parte preliminary relief, the prejudgment procedure will be upheld as a "constitutional accommodation of the conflicting interests."

Id. at 128-29 (citing The Supreme Court, 1973 Term, 88 Harv. L. Rev. 41, 75 (1974)).

To determine whether the potential for harm to Watertown Equipment was indeed "slight," we must compare the procedural safeguards mandated by the Supreme Court with those provided by the South Dakota attachment statute. We agree with the appellees that the four Supreme Court decisions and our decisions such as *Guzman* point to five primary factors: (1) an affidavit accompanying the petition for the writ of attachment which contains facts alleged by a person with knowledge; (2) an opportunity for the debtor to dissolve the writ by posting a bond; (3) an "early" post-deprivation hearing at which the creditor bears the burden of proving the legality of the writ of attachment; (4) indemnification of the debtor for a wrongful attachment; and (5) judicial supervision of the attachment process.[2] In the end,

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[2]These factors were also recognized in *Lewis Service Center, Inc. v. Mack Financial Corp.*, 696 F.2d 66, 68 (8th Cir. 1982), a case decided on December 27, 1982, just a couple of months after the

however, the appellees must show that it was not clearly established on October 25, 1982, that the potential harm to Watertown Equipment under the South Dakota statute was more than "slight" in light of the "substantial advancement" of the state interest in protecting a creditor from a dissipation of collateral. The appellees contend that chapter 21-17 provided sufficient safeguards.

The South Dakota statute, as construed by the courts, did provide some of the safeguards mandated by the Constitution, such as requiring an affidavit setting out the "specific facts" in support of the claim. *See Mitchell*, 416 U.S. at 616. While the South Dakota statute did not on its face require the showing of "specific facts" in the affidavit, see S.D. Codified Laws Ann. § 21-17-3 (1979), it was interpreted by the South Dakota Supreme Court as requiring such a showing. S*ee Black Hills Mercantile Co. v. Bender*, 59 S.D. 241, 238 N.W. 883, 885 (1931) (interpreting section 2433 of the South Dakota Revised Code of 1919 which, in relevant part, is similar to section 21-17-3).

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attachment in this case. The district court stated that "[h]ad the *Lewis* decision been on the books prior to the action in this case, it's the view of the Court that there * * * probably would be an issue of fact * * * whether * * * Defendant Green knew or should have known that * * * the attachment statute was unconstitutional." We believe that earlier cases such as *Guzman* and *Mitchell*, which both considered prejudgment attachment, are as or more instructive than *Lewis*, which considered a replevin action under a Nebraska statute.

Although Norwest did not state specific facts in support of the attachment in its affidavit,[3] Watertown Equipment did not seek dissolution of the writ in state court on the basis of this omission. Because state law on this issue would have provided a sufficient remedy, we could not find a constitutional violation based to any extent on the insufficiency of the facts in the affidavit. *See Lugar*, 457 U.S. at 940 (private creditor's actions unlawful under state attachment law cannot be attributed to the "state" for the purposes of section 1983).

The appellees point to other safeguards in the South Dakota statute. *Mitchell* and *North Georgia Finishing* stress the importance of an "immediate" post-deprivation hearing wherein the creditor has the burden of proving the grounds upon which the writ was issued. *See Guzman*, 516 F.2d at 131. The South Dakota statute can be interpreted as having provided for an immediate hearing. Although the statute did not specify when a hearing must occur, its language was, in essence, no different on this point from the Louisiana sequestration statute which, in *Mitchell*, 416 U.S. at 606, 622, the Supreme Court said provided for an immediate post-deprivation hearing.

The appellees also point to the provision in the South Dakota statute which allowed the debtor to post a bond

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[3]Norwest set forth two grounds for the attachment in its affidavit: that Watertown Equipment "has secreted, encumbered, transferred and disposed of and may be about to secrete, encumber, transfer, or otherwise dispose of property pledged as collateral to the Plaintiff with intent to defraud or delay this Plaintiff, as a creditor;" and that "the Defendant has removed a portion of the collateral and has attempted to remove additional portions of the collateral pledged as security for said loans from the State of South Dakota with intent to defraud or to delay this creditor."

immediately after the attachment and regain possession of the property before a hearing. *See* section 21-17-26. *Mitchell* mentions this as one factor which could minimize the harshness of the prejudgment attachment. 416 U.S. at 608.[4]

These safeguards, however, do not make up for the lack of other crucial safeguards. First, the Supreme Court has required the active participation of a judge in approving the writ. As this Court said in *Guzman*, "[c]learly, the Court in *Mitchell* believed that the active participation of a judge, exercising judicial discretion whenever necessary, would aid in minimizing the likelihood of an improvident issuance of a writ of sequestration." 516 F.2d at 131. Thus, in *Guzman*, this Court concluded that "*Mitchell* mandates that we review the North Dakota attachment law to determine if there is meaningful judicial supervision of the prejudgment attachment process." *Id.*

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[4]It should be pointed out, however, that the requirements in posting a bond were much harsher for the debtor under the South Dakota statute than under the Louisiana sequestration statute discussed in *Mitchell*. The undertaking required of the debtor to regain possession of the attached property required execution by a "corporate surety or two resident freeholders of the state to be approved by the sheriff, conditioned that they will pay to the plaintiff on demand the amount of any judgment which the plaintiff may recover against the defendant in the action, with interest and costs." Section 21-17-26. Watertown Equipment would have had to post a bond for a debt of $488,000. The Louisiana sequestration statute, on the other hand, only required that the debtor's bond "shall exceed by one-fourth the value of the property as determined by the court, or shall exceed by one-fourth the amount of the claim, whichever is the lesser." *Mitchell*, 416 U.S. at 607 n.9 (citing La. Code Civ. Proc. Ann. Art. 3508).

Here, as in *Guzman*, it is readily apparent that there was no meaningful supervision. The writ was obtainable from the clerk of court. *See* section 21-17-3.[5] No judge was to be involved in the matter unless a hearing was requested. *See* section 21-17-3. This falls far short of the Louisiana statute in *Mitchell* which provided "judicial control of the process from beginning to end." 416 U.S. at 616.

The appellees contend that in *North Georgia Finishing*, the Supreme Court retreated from requiring participation of a judge. As our Court in *Guzman* recognized, however, the intimations of the unimportance of judicial supervision come from the concurring and dissenting opinions. *See id.* at 611 n.3 (Powell, J., concurring); *id.* at 619 (Blackmun, J., dissenting). We still are "compelled" to follow the opinion in *Mitchell*. 516 F.2d at 131 n.7.

The Fifth Circuit has found a lack of judicial supervision fatal to the constitutionality of an attachment statute. *See Johnson v. American Credit Co. of Georgia*, 581 F.2d 526, 534 n.16 (citing *Guzman* 516 F.2d at 130 for the proposition that judicial supervision is necessary). While a lack of judicial supervision arguably may not have rendered the South Dakota attachment statute clearly unconstitutional in 1982 to a creditor in this Circuit, it does when combined with an additional defect: the bond in this case provided wholly inadequate indemnification of the debtor in case of a wrongful attachment. The Supreme Court has recognized that the creditor must post a bond and be liable for any damages resulting from a

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[5]Section 21-17-3 provided that a "warrant of attachment may be obtained from the clerk of the court in which the action is brought upon filing the undertaking required in § 21-17-4, and an affidavit."

wrongful attachment. *Mitchell,* 416 U.S. at 610, 617, 618-19. The bond and full liability of the creditor serve two purposes. They deter an overzealous creditor from using attachment in the first place. *Id.* at 609-10. And, more importantly, they make the debtor whole if the attachment turns out to be wrongful. *Id.* at 617, 618, 619.

Mitchell clearly directs that not only must there be provision for payment to the defendant for damages, but also the payment must be sufficient. The Louisiana sequestration statute allowed damages for deprivation of the use of the sequestered property, humiliation, injury to reputation, and attorney's fees. *Id.* at 606 and n.8. As the Supreme Court noted in its final paragraph summarizing why the Louisiana sequestration statute was constitutional, "the prevailing party is protected against *all* loss." 416 U.S. at 619 (emphasis added).

Even Justice Powell, who in his concurring opinion in *Mitchell* argued for the overruling of *Fuentes* because he believed that opinion swept too broadly, agreed that the creditor must at a minimum provide adequate security in the case of a wrongful attachment:

> In my view, the constitutional guarantee of procedural due process is fully satisfied in cases of this kind where state law requires, as a precondition to invoking the State's aid to sequester property of a defaulting debtor, *that the creditor furnish adequate security* and make a specific factual showing before a neutral officer or magistrate of probable cause to believe that he is entitled to the relief requested. An opportunity for an adversary hearing must then be accorded promptly after sequestration.

Id. at 625 (emphasis added). *See also North Georgia Finishing,* 419 U.S. at 611 n.3 (where Justice Powell states that a post-deprivation hearing "combined with the availability of the garnishor's bond to compensate for any harm caused *** suffices to satisfy the requirements of procedural due process in this context").

A recent Eleventh Circuit case, *Jones v. Preuit & Mauldin*, 822 F.2d 998 (11th Cir. 1987), reinforces our conclusion about the centrality of indemnification of the debtor for all loss in the case of a wrongful attachment. The Eleventh Circuit did not find the Alabama attachment statute to violate clearly established law in 1982 because the statute required a factually specific affidavit, judicial supervision from "beginning to end," a creditor's bond, and an immediate post-deprivation hearing. Thus, the private creditors were entitled to qualified immunity.

The court noted, however, that one of the themes running through "all of the Supreme Court decisions" on creditor remedies, in addition to the need for an early post-deprivation hearing and judicial supervision, is that a debtor's "financial interest must be protected in the event of a wrongful prejudgment attachment, either via the posting of a bond by the creditor who seeks the writ, or by allowing an action for damages suffered as a result of a wrongful attachment." *Id.* at 1002. The debtor's "financial interest" in *Jones* was protected because the Alabama statute provided that in an action on the bond the debtor could recover "such damages as *he has actually sustained* if the attachment was wrongfully sued out." *Id.* at 1004 (quoting Ala. Code § 6-16-148 (1975)). (Emphasis added). Clearly, the centrality of an adequate bond for

the protection of the debtor was well established by 1975.[6]

The inadequacy of the bond in section 21-17-4 is clear. That section states that "in no case shall an undertaking [i.e., a bond or guarantee] be required exceeding in amount the sum of ten thousand dollars." Furthermore, the South Dakota Supreme Court has determined that neither the common law nor the South Dakota attachment statute creates liability independent of the bond unless malice or lack of probable cause is shown. *See Slaughter v. Nolan,* 41 S.D. 134, 169 N.W. 232 (1918). Thus, the defendant is only protected from plaintiff's wrongful attachment for damages up to $10,000.

Norwest posted an undertaking in attachment which states that

> FIRST NATIONAL BANK OF WATERTOWN, as Principal, of Watertown, South Dakota and Western Surety Company, as Surety, do undertake, promise and agree to and with the said Defendant that if the said Defendant recover Judgment, or if the Court shall finally decide that the Plaintiff was not entitled to an Attachment and that said Attachment be set aside by the Order of the Court, the Plaintiff shall and will pay all costs that may be awarded to the Defendant, and all damages which it

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[6]In *Lewis Service Center*, 696 F.2d at 66, in a replevin action, the creditor was not required to post a bond before obtaining a temporary order requiring the defendant to hold the property "unimpaired and unencumbered" until a hearing was held. We reasoned that the absence of a bond was not a "fatal defect in view of the retention of possession by the debtor pending the provision of a prompt hearing." *Id.* at 69. Here, however, Watertown Equipment clearly had no access to its equipment or other

> may sustain by reason of issuing the attachment *not exceeding the sum of $10,000.00.* [Emphasis added.]

By Norwest's own estimate, the property which it attached had a fair market value of between $275,000 and $300,000.[7] Norwest maintained the attachment on the property of Watertown Equipment for several months. The attachment brought all business at Watertown Equipment to a screeching halt. Clearly, even if Watertown Equipment had immediately requested a hearing to contest the attachment, the damages for loss of business and harm to reputation and for attorney's fees would easily have exceeded $10,000. In view of the facts of this case, it is readily apparent that the potential for harm to Watertown Equipment and Moe under the South Dakota attachment procedure was far from "slight." And this conclusion was readily apparent when the attachment occurred in 1982.

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[7]An exhibit submitted with the affidavit listed as property to be attached:

> The following specific property:
>
> 71-706-IHC tractor w/F 10 Farmall Loader; 60 Case 930 Comfort King Tractor; 1977 Dodge Van; and 1975 Ford Pick-up
>
> The Defendant's leasehold interest in that certain real property located in Codington County, South Dakota * * *
>
> and
>
> All debts, credits, money, bank notes, rights or shares which the Defendant may have in the Stock of any association or corporation, together with the interest and profits thereon;

A comparison between the effect of an attachment under the South Dakota statute and the effect under the Louisiana sequestration statute as summarized in *Mitchell* further highlights the potential for harm in the South Dakota statute:

> Here, the initial hardship to the debtor is limited, the seller has a strong interest, the process proceeds under judicial supervision and management, and the prevailing party is protected against all loss.

416 U.S. at 618-19.

In contrast, even if we assume a strong interest on the part of the creditor, the hardship to the debtor in this case was extensive--an entire business was closed--the process did not proceed under judicial management, and if the debtor would have prevailed in showing that the attachment was wrongful, it would have been unable to recover for any loss over $10,000. This procedure clearly was not constitutionally acceptable in 1982 when the attachment in this case occurred.

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and

All shop equipment, inventory, office fixtures, other fixtures, office equipment, accounts receivable, contract rights, choses in action, tools, new parts, used parts, general intangibles, new farm machinery and equipment, used farm machinery and equipment, and all other property in the possession of or under the control of the Defendant.

B. Advice of Attorney Green.

Appellees Norwest Bank and Jerry Miller claim that despite the fact that the law may have been clearly established, they should still be immune because they relied in good faith on the advice of their attorney. Although *Harlow* establishes an objective test--whether the law was clearly established--it does provide that in certain "extraordinary circumstances," the objective standard may not end the qualified immunity inquiry. *See* 454 U.S. at 819; *see also Barnett v. Housing Authority of City of Atlanta,* 707 F.2d 1571, 1583 (11th Cir. 1983). As two commentators have recognized, one possible extraordinary circumstance may be where the defendant seeks the advice of counsel before acting. *See* M. Schwartz & J. Kirklin, "Section 1983 Litigation: Claims, Defenses, and Fees" (1986). Courts have generally found that the advice of an attorney may be a factor in shielding a defendant from liability under section 1983. *See Duchesne v. Sugarman*, 566 F.2d 817, 833 n.32 (2d Cir. 1977); *Tanner v. Hardy,* 764 F.2d 1024, 1027 (4th Cir. 1985); *Crowe v. Lucas,* 595 F.2d 985, 992 (5th Cir. 1979). This Court has also recognized that although reliance on the advice of counsel alone will not satisfy an official's burden of acting reasonably, it may be a factor which bears on the question of qualified immunity. *See Wentz v. Klecker*, 721 F.2d 244, 247 (8th Cir. 1983).

We believe the facts in the *Tanner* and *Wentz* cases are instructive on this point. In *Tanner*, personnel at a facility for juvenile delinquents were holding a person who had been convicted of rape. A state court had to decide whether the individual could be legally held for a period longer than his sentence because he persisted in "aggravated anti-social or criminal behavior." 764 F.2d at

1025-26. The state court, however, did not timely decide the issue. Thus, the defendants were faced with a "perilous situation," whether to release a potentially dangerous person in their custody or face possible liability for unlawfully detaining him. *Id.* at 1026. The defendants consulted the Assistant Attorney General who apparently advised them not to release the individual. The Fourth Circuit remanded the case to determine whether the defendants "acted properly in relying on legal advice of the Maryland Attorney General's office." *Id.* at 1027.

Our Court in *Wentz* considered a case in which an employee of a state school for the mentally retarded was fired. The employee claimed that he had a right to a hearing before being fired. The director of the school, before firing the employee, consulted an attorney who told the director that the employee was not a state employee under the law. We held that even though seeking advice of counsel will not satisfy a defendant's burden of acting reasonably, the employee in this case was in a "unique employment situation," and that the employee was not "clearly entitled to a hearing under state law." 721 F.2d at 247.

We do not believe that Norwest Bank and Jerry Miller confronted either a "perilous" or "unique" situation. Nor does this situation present the possible public concerns or urgency confronted by a law enforcement officer seeking a warrant for an arrest or search. *See Arnsberg v. United States,* 757 F.2d at 971, 981 (9th Cir. 1985), *cert. denied,* _____ U.S. _____, 106 S.Ct. 1183, 89 L.Ed.2d 300 (1986). Rather, we think this case much more closely resembles *Jones v. Preuit & Maudlin,* 822 F.2d at 998, where the Eleventh Circuit in dicta stated in regard to this issue that "seeking a writ of attachment is not normally

a[n] 'extraordinary event.'" *Id.* at 1000 n.3.

In this case, it does not appear that Norwest's attorney, Green, fully explained the import of the Supreme Court decisions on prejudgment creditor remedies. At the same time, he did not unequivocally assure Norwest of the constitutionality of the South Dakota attachment statute thus inviting complete reliance. In his letter to Jerry Miller, Green only mentioned the Supreme Court's decision in *Sniadach*. He noted that "[s]ince 1969 there have been many cases decided dealing with the constitutionality of garnishment laws, attachment laws, claim and delivery laws and other laws which generally allow a party to deprive another of property without notice and without an opportunity to be heard." Green then went on to say that other state courts had declared similar attachment laws unconstitutional. He concluded that South Dakota's attachment law was distinguishable although "there is some risk" that Watertown Equipment could successfully attack its constitutionality.

Because Green's advice was somewhat equivocal and because this case does not present a unique factual situation or a "perilous" one which clearly demanded prompt action, we believe Green's advice to Norwest and Miller should not insulate them from liability for violating clearly established law.

C. Green's Actions.

Appellee Green argues that he should not be held liable because he merely advised his client of the possible unconstitutionality of the South Dakota statute and instituted the attachment proceedings at the direction of the client. This question concerns whether Green acted

"under color of state law" in advising Norwest and participating in the attachment procedure. It is clear that Norwest and Miller acted under color of state law in instituting an attachment under South Dakota law because they acted in "joint participation" with state officials in seizing Watertown Equipment's property.[8] *See Lugar,* 457 U.S. at 941 (private creditor acting under unconstitutional Virginia attachment law acted in joint participation with state officials and thus under color of state law).

In determining on remand whether Green also acted under color of state law, we note our discussion in *Buller* on this question. There, we said that the attorney may be liable under section 1983 because he caused garnishment proceedings to be instituted against the plaintiffs; as an attorney, was in a better position than his client to know the law; may have refused to comply with his client's request to release the debtor's property; and had a monetary interest in proceeding with the garnishment. 706 F.2d at 852.

We do not believe there is a discrepancy between our holding in *Buller* and our holdings in cases such as *Chapman v. Musich*, 726 F.2d 405 (8th Cir.), *cert. denied*, 469 U.S. 931 (1984), where this Court held that a public defender performing his or her traditional function as defense counsel did not act under color of state law, or cases such as *Dunn v. Hackworth*, 628 F.2d 1111 (8th Cir. 1980) (per curiam), where we held that a private attorney was not acting under color of state law in acting as a

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[8]Norwest acted on the basis of its policy-making unit, the Discount Committee, and thus was a joint participant. *See Jones,* 808 F.2d at 1442 n.3.

defendant's counsel in a criminal proceeding. The purpose of the holding in these cases was not simply to insulate attorneys from liability under section 1983 but to protect the integrity of the judicial process and to recognize the independence of their action from the state. Thus, even non-lawyers, such as witnesses, cannot be sued under section 1983 for giving perjured testimony at trial. *See Briscoe v. LaHue*, 460 U. S. 325 (1983). In attachment proceedings and other cases, as the Supreme Court established in *Lugar*, the key is "joint participation" with state officials in depriving someone of his or her constitutional rights. *Cf. Tower v. Glover*, 467 U.S. 914, 920 (1984) (holding a public defender acts under color of state law when not acting as an adversary of the state but instead conspiring with a state official). It is a factual question to be determined on remand whether Green's advice to Norwest and institution of the attachment proceeding was "joint participation" with state officials and thus action under color of state law.

We therefore hold that Norwest, Moe, and Green are not entitled to qualified immunity. We also hold that there is a factual question whether Green acted under color of state law. We remand to the district court for consideration of the merits of the state and federal claims.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

FILED
Oct. 08, 1987
Robert D. St. Vrain,
Clerk

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 86-5448SD

Watertown Equipment Company and
Edward Moe, Jr.,

Appellant,

vs.

Norwest Bank Watertwon, N.A.,
formerly First National Bank of Watertwon;
Jerry Miller, Vice President of Norwest Bank,
Watertwon, N.A.; Thomas Green,
Attorney for Norwest Bank, Watertown, N.A.,

Appellees.

Appeal from the United States District Court for the
District of South Dakota

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration it is ordered and adjudged that the judgment of the district court be reversed and the cause remanded to the district court for proceedings consistent with the opinion of this Court.

October 8, 1987

Appellant will recover the sum of $116.92 for taxable costs from appellees.

A true copy.

ATTEST: /s/ Robert D. St. Vrain

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

MANDATE ISSUED: 1/20/88

Filed
Jan. 25, 1988
William F. Clayton,
Clerk

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5448SD

Watertown Equipment Company, etc.

Appellant,

vs.

Norwest Bank Watertown, N.A.,
etc., et al,

Appellees.

Appeal from the United States District Court for the
District of South Dakota

Petitions for rehearing en banc filed by appellees, Norwest Bank Watertown, N.A., and Jerry Miller and appellee, Thomas Green, have been considered by the Court and are denied.

Judges John G. Gibson, Roger L. Wollman, Frank Magill, and C. Arlen Beam would have granted the petitions.

Petitions for rehearing by the panel are also denied.

December 23, 1987

Order entered at the direction of the Court:
/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

WATERTOWN EQUIPMENT COMPANY and
EDWARD MOE, JR.,

Appellants,

vs.

NORWEST BANK WATERTOWN, N.A.,
formerly First National Bank of Watertown;
JERRY MILLER, Vice President of
Norwest Bank Watertown, N.A.; THOMAS GREEN,
Attorney for Norwest Bank Watertown, N.A.,

Appellees.

No. 86-5448-SD

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that THOMAS GREEN, one of the Appellees above named, hereby appeals to the Supreme Court of the United States from the Judgment of the United States Court of Appeals for the Eighth Circuit dated October 8, 1987, reversing the Summary Judgment for Appellee entered by the United States District Court for the District of South Dakota on November 25, 1985.

This Appeal is taken pursuant to 28 USC § 1254(2).

Dated at Sioux Falls, South Dakota, this 29th day of February, 1988.

DAVENPORT, EVANS, HURWITZ, & SMITH

/s/ Lawrence L. Piersol
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Thomas Green

CHAPTER 21-17

S. D. CODIFIED LAWS
ATTACHMENT OF PROPERTY

21-17-1. Grounds for action and attachment before claim due--Judgment delayed until claim due.--A creditor may bring action on a claim before it is due and have attachment against the property of the debtor:

(1) When the defendant has removed or is about to remove any of his property from this state, with intent to defraud or delay his creditors;

(2) When the defendant has secreted, encumbered, transferred, or otherwise disposed of, or is about to secrete,encumber, transfer or otherwise dispose of, any of his property with like intent;

(3) When the debt was incurred for property obtained under false pretenses.

In such cases the proceedings shall be conducted in all respects as if the claim were due, but judgment must not be rendered in the action until the debt or claim upon which such attachment is made shall become due and payable.

21-17-2. Grounds for attachment in civil action--Time when remedy available.--The plaintiff in a civil action, at the time of issuing the summons or at any time thereafter, may have the property of the defendant attached, in the manner hereinafter prescribed, as security for the satisfaction of such judgment as the plaintiff may recover, in any of the following cases:

(1) When the defendant is a corporation and has no officer, agent, or attorney upon whom the summons can be served within this state;

(2) When the defendant is not a resident of this state;

(3) When the defendant has departed from this state with intent to defraud or delay his creditors or to avoid the service of summons or keeps himself concealed therein with like intent;

(4) When the defendant, either person or corporation, has removed or is about to remove any of his or its property from this state, with intent to defraud or delay his or its creditors;

(5) When the defendant, either person or corporation, has secreted, encumbered, transferred, or otherwise disposed of, or is about to secrete, encumber, transfer, or otherwise dispose of any of his or its property with like intent;

(6) When the defendant has fraudulently contracted the debt or incurred the obligation for which the suit is, or has been brought.

In an action to recover purchase money, for personal property sold to the defendant, an attachment may be issued and levied upon such property.

For the purposes of this section an action shall be deemed commenced when the summons is issued; provided that personal service of such summons shall be made or publication thereof commenced within thirty days from date of issue of the warrant of attachment.

21-17-3. Affidavit required for issuance of warrant--Contents.--A warrant of attachment may be obtained from the clerk of the court in which the action is brought upon filing the undertaking required in § 21-17-4, and an affidavit, stating:

(1) That a cause of action exists against the defendant, specifying the amount of the claim and grounds thereof;

(2) One or more of the grounds for attachment prescribed in § 21-17-2;

(3) If the attachment is to be limited to any certain specific property of the defendant, a description thereof with common certainty, and a declaration of its fair market value.

21-17-4. Undertaking required of plaintiff--Amount and terms.--Before issuing the writ of attachment the clerk must require a written undertaking on the part of the plaintiff, with two or more sufficient sureties, or a cash deposit, in a sum not less than double the amount claimed by the plaintiff if such amount be one thousand dollars or under, or, in case the amount claimed by the plaintiff shall exceed one thousand dollars, than in a sum equal to such amount, unless the affidavit for attachment describes with common certainty specific property of the defendant to be attached and declares the fair market value thereof and limits the attachment thereto, in which case the undertaking shall be in the amount of such declared value, but not less than two hundred and fifty dollars, but in no case shall an undertaking be required exceeding in amount the sum of ten thousand dollars. The condition of such undertaking shall be to the effect that if the defendant recover judgment, or if the court shall finally decide that the plaintiff was not entitled to an attachment, the plaintiff will pay all costs that may be awarded to the defendant, and all damages he may sustain by reason of issuing the attachment, not exceeding the sum specified in the undertaking.

21-17-5. Exception by defendant to sufficiency of sureties--Failure to except as waiver--Justification--Vacation of writ on failure to justify.--Within five days after the service of the summons in the action, the defendant may except to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objections to them.

When excepted to, the plaintiff's sureties, upon notice to the defendant of not less than two days nor more than five days, must justify before a judge of the circuit court, and upon failure to so justify, or if others in their place fail to justify, at the time and place appointed, the judge shall issue an order vacating the writ of attachment.

21-17-6. Issuance and direction of writ--Contents.--The writ of attachment may be issued by the clerk and attested in the name of a judge of the court. It must be directed to the sheriff of any county in which property of such defendant may be, and, unless the writ shall limit attachment to certain specific property therein described with common certainty, in which case only that property shall be attached, must require him to attach and safely keep all the property of such defendant within his county, not exempt from execution, or so much thereof as may be sufficient to satisfy the plaintiff's demand, the amount of which must be stated in conformity with the affidavit, unless the defendant give him security by the undertaking of sufficient surety, in an amount sufficient to satisfy such demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached, or, if the value of any such property has been declared in the affidavit for attachment, then in such amount; in which case to take such undertaking.

21-17-7. Several writs issued on same affidavit and undertaking.--Several writs of attachment may be issued on the same affidavit and undertaking at the same time or successively to the sheriffs of different counties, but the fee for issuing of only such as are actually executed may be taxed as costs.

21-17-8. Attachment of property by sheriff.--The sheriff to whom such writ of attachment is directed and delivered must, unless such writ otherwise directs, immediately attach all the real and personal property of such debtor, including debts, credits, money, and bank notes, and rights or shares which such debtor may have in the stock of any association or corporation, together with the interest and profits thereon.

21-17-9. Redemption rights subject to attachment--Discharge of lien by creditor--Subrogation to debtor's rights.--The right of redemption from foreclosure or execution sale of real property of a debtor shall be subject to attachment by his creditors, who shall from and after levy of a writ of attachment also have all the rights of the debtor to discharge any lien on the property, and shall by payment thereof be subrogated to all his rights. If any redemption from foreclosure or execution sale is made by or on behalf of the debtor, such payment shall inure to the benefit of the attaching creditor, who shall by his attachment acquire all the rights of a redemptioner.

21-17-10. Levy of attachment as on execution.--A levy under a warrant of attachment must be made in the same manner as a levy upon execution under the provisions of §§ 15-18-20 to 15-18-27, inclusive, and in making such levy the warrant of attachment shall correspond to the execution specified in said sections.

21-17-11. Levy on intangible property--Certificate required as to defendant's interest--Attendance by debtor and enforcement of order.--Whenever the sheriff shall, with a warrant of attachment or execution against the defendant, apply to an officer of a corporation, debtor, or individual, for the purpose of attaching or levying upon

property incapable of manual delivery, such officer, debtor, or individual shall furnish him with a certificate under his hand, designating the number of rights or shares of the defendant in the stock of such association or corporation with any dividend or any encumbrance thereon, or the amount and description of the property held by such association, corporation, or individual, for the benefit of or debt owing to the defendant. If such officer, debtor, or individual refuse to do so, or if it be made to appear by affidavit or otherwise to the satisfaction of the court or judge thereof, that there is reason to suspect that any certificate given by him is untrue, or that it fails to fully set forth the facts required to be shown thereby, he may be required by the court or judge to attend before him, and be examined on oath concerning the same, and obedience to such order may be enforced by attachment.

21-17-12. Lien of attachment--Duration of lien in absence of judgment.--The lien of the attachment shall be effectual from the time when a levy is made in accordance herewith, but the attachment shall be void and of no effect without any further action at the end of six years from the date of filing notice of attachment or levy under such attachment if, within such time, no judgment in the proceeding had been entered.

21-17-13. Sheriff's inventory of property seized--Subsequent levies.--Immediately upon making seizure under an attachment, the sheriff shall make a just and true inventory of all the property so seized, and of the books, vouchers, and papers taken into his custody, stating therein the estimated value of the several articles and kinds of personal property, enumerating such of them as are perishable, and giving a description of real property so at-

tached, which inventory must be signed by the sheriff, attached to and made a part of the return on the warrant of attachment. Any subsequent execution of the warrant of attachment upon other property of the debtor must be made, and an inventory thereof made and returned, in like manner.

21-17-14. Return of writ--Time allowed.--Such officer shall, within twenty days after making such seizure, file all of said papers, including said inventory and return, with the clerk of the court who issued the warrant.

21-17-15. Proceedings not rendered void by failure of return--Contempt and amercement or civil action against sheriff.--The failure or neglect of the officer to make the verified inventory and return and file the same in the office of the clerk with all other papers in the manner and within the time required by §§ 21-17-13 and 21-17-14 shall not however void his proceedings under the warrant of attachment but shall render him liable to punishment by the court as for contempt and liable by amercement or civil action to any person thereby injured in like manner as is provided with reference to writs, warrants and executions by § 15-18-44.

21-17-16. Collection and keeping of property by sheriff.--The sheriff must keep the property seized by him, or the proceeds of such as shall have been sold, to answer any judgment which may be obtained in such action, and must, subject to the direction of the court or judge, collect and receive into his possession all debts, credits, and effects of the debtor.

21-17-17. Legal proceedings by sheriff to collect property.--The sheriff may also take such legal

proceedings, either in his own name or in the name of the debtor, as may be necessary for that purpose, and discontinue the same at such times and on such terms as the court or judge may direct.

21-17-18. Prosecution of actions by plaintiff--Undertaking to indemnify sheriff--Justification by sureties.-- The actions herein authorized to be brought by the sheriff may be prosecuted by the plaintiff, or under his direction, upon the delivery by him to the sheriff of an undertaking executed by two sufficient sureties, to the effect that the plaintiff will indemnify the sheriff for all damages, costs, and expenses on account thereof, not exceeding two hundred fifty dollars in any one action. Such sureties shall, in all cases, when required by the sheriff, justify by making an affidavit that each is a freeholder and worth double the amount of the penalty of the bond, over and above all demands and liabilities, and exclusive of property exempt from execution.

21-17-19. Compensation and expenses of officer attaching property--Advancement of storage and maintenance costs.-- When personal property is seized on attachment, the court or judge may allow to the officer having charge thereof such compensation for his trouble and expenses in keeping and maintaining the same as shall be reasonable and just. If the property seized by the sheriff requires the expenditure of money for its storage or maintenance, the sheriff may require the plaintiff to advance the reasonable cost thereof, and if the plaintiff fails to pay the same upon demand, the sheriff, on three days' notice may apply to the court for an order dissolving the attachment, and the court may so order. Any expenses so paid by the sheriff or by the plaintiff shall be included in the plaintiff's judgment or added thereto.

21-17-20. Sale of perishable property attached--Disposition of proceeds.--If any of the property seized on attachment shall be perishable, the sheriff must sell the same at public auction, under an order of the court or a judge thereof, and must retain in his hands the proceeds of such sale after deducting his expenses, which proceeds must be paid into court and there abide its further order.

21-17-21. Trial of third-party claims to property.--If any property seized on attachment be claimed by or on behalf of any person other than the defendant, the sheriff may summon a jury and try the validity of such claim in the same manner and with like effect as in case of seizure under execution.

21-18-22. Grounds for dissolution of attachment.--The defendant or any person who has acquired a lien upon or interest in the defendant's property after it was attached may move upon notice to dissolve the attachment:

(1) When there has been substantial departure from the requirements of the statute in obtaining or issuing the warrant;

(2) When the facts alleged as grounds of attachment in the affidavit upon which the warrant was issued are untrue;

(3) If no judgment has been entered within three years after the filing of notice of levy of attachment or the action has been abandoned, in which event the procedure described by §§ 21-17-23 and 21-17-24 so far as applicable, shall apply until other or additional procedure is provided by statute or rule.

21-17-23. Defects specified in notice to dissolve attachment--Affidavit and counteraffidavit.--When made

under § 21-17-22, the notice of motion or order to show cause shall specify the alleged defects, and when any of such defects does not appear upon the face of the papers, must be supported by affidavit, which may be opposed by affidavit on the part of the plaintiff.

21-17-24. Defendant's affidavit denying grounds of attachment--Trial and determination of motion to dissolve.--When made under § 21-17-22, the notice or order to show cause shall be accompanied by an affidavit specifically denying each ground of attachment stated in the affidavit or attachment; and the issue or issues thus joined shall be heard and determined by the court upon affidavits or other evidence, and unless the court shall be satisfied from all the evidence of the truth of the affidavit for attachment as to at least one of the grounds of attachment stated therein, the warrant of attachment shall be dissolved.

21-17-25. Release of attachment available before judgment.--A defendant may procure the release before judgment of property which has been attached, as provided by §§ 21-17-26 to 21-17-29, inclusive.

21-17-26. Defendant's undertaking to obtain release from attachment.--A defendant may file with the sheriff who seized property under attachment, an undertaking, executed by a corporate surety or two resident freeholders of the state to be approved by the sheriff, conditioned that they will pay to the plaintiff on demand the amount of any judgment which the plaintiff may recover against the defendant in the action, with interest and costs.

21-17-27. Notice to plaintiff of defendant's undertaking for release--Exception to sufficiency of

sureties--Justification by sureties.--Upon receiving the bond provided by § 21-17-26 the sheriff shall at once give written notice of the filing thereof to the plaintiff's attorney, by personal service or by registered or certified mail, which notice shall state the names of the persons offered as sureties. Within three days after receiving such notice, the plaintiff may give written notice to the sheriff that he excepts to the sufficiency of the sureties, and in the absence of such notice, such exception is deemed waived. The sheriff shall at once file with the clerk of the court or judge who issued the attachment the proof of the service of such notice, and of the filing of any exception. If exception to the sureties is taken, the sheriff shall at once notify the defendant thereof and the sureties must justify in the time and manner provided in chapter 15-22 before the clerk who issued the execution.

21-17-28. Dismissal of attachment by clerk--Delivery of property to defendant.--Upon the expiration of the time within which exceptions may be taken to the sureties pursuant to § 21-17-27, or upon the approval of the undertaking by the clerk after justification, the clerk shall issue to the sheriff a dismissal of the warrant, and the sheriff shall deliver to the defendant any attached personal property and execute and acknowledge a written dismissal of any levy upon real property.

21-17-29. Defendant's affidavit to release property worth less than the plaintiff's claim--Appraisement and undertaking.--If the defendant shall file with the sheriff an affidavit that he desires to procure the release of attached property which is worth less than the amount of the plaintiff's claim, whether such property be all or only part of the property attached, the sheriff, at the expense of the defendant, shall appoint a competent and

disinterested appraiser who shall make an appraisement thereof under oath and in writing which the sheriff shall forthwith file with the clerk who issued the warrant, and the release bond shall then be conditioned as provided in § 21-17-26, but not exceeding double the appraised value. All other provisions of §§ 21-17-26 to 21-17-28, inclusive, shall apply in such a case.

21-17-30. Liability of sheriff for improper dismissal of levy or delivery of property to defendant.--If the sheriff dismiss any levy on real estate or deliver to the defendant any attached personal property, except upon a judgment of the court or dismissal by the clerk, he and his official bondsmen shall be personally liable to the plaintiff for any resulting damages.

21-17-31. Action by one of several defendants to release property or dissolve attachment.--When there is more than one defendant, any one of such defendants may apply for the release of his several property by furnishing undertaking as provided by statute for release of attached property by undertaking, or move to dissolve the attachment as to his several property, as provided in §§ 21-17-23 to 21-17-25, inclusive, but the same defendant may not pursue both of such remedies.

21-17-32. Application by partners to release partnership property.--If a warrant of attachment be levied upon the interest of one or more partners in personal property of a partnership, the other partners, or any of them, may, at any time before judgment, apply to the court from which the warrant of attachment issued, or a judge thereof, upon affidavits stating such fact, for an order to release the attachment as to the partnership property.

21-17-33. Undertaking to release partnership property --Exceptions and justification by sureties.--The applicant under § 21-17-32 must give an undertaking, with at least two sufficient sureties, to the effect that, if judgment shall be rendered in the action in favor of the plaintiff, they will pay to the sheriff on demand the amount of defendant's interest in such partnership property, the amount of such interest to be determined by reference or otherwise, as the court may direct. The amount of such undertaking must be fixed by the court or judge thereof, and must not be less than the value of the interest of the defendant in the goods, chattels, credits, and effects of the partnership; and for the purpose of fixing the amount of the undertaking, the court or judge may hear affidavits or oral testimony, respecting the value of the defendant's interest in the attached property. If the plaintiff except to the sufficiency of the sureties they must justify, as upon bail on arrest.

21-17-34. Return of property on judgment for defendant--Discharge of warrant.--If the defendant recover judgment against the plaintiff in such action, any bond taken by the sheriff, except the bond given to indemnify the sheriff against damages, costs, and expenses in actions prosecuted by the plaintiff for collection of things due the defendant, all the proceeds of sales and moneys collected by him, and all the property attached remaining in his hands, shall be delivered by him to the defendant, or his agent, on request, and the warrant shall be discharged and the property released therefrom.

21-17-35. Levy under execution not required for sale of property held under attachment.--If an execution has been issued upon the judgment in the action and any of the attached property is held under the levy of the officer

pursuant to the warrant of attachment, no additional levy under the execution shall be required to authorize execution sale of any of the property held by the officer or under any notice of levy under the warrant of attachment pursuant to the provisions of § 21-17-10.

21-17-36. Application of money held by sheriff to judgment for plaintiff.--In case judgment be entered for the plaintiff in such action, the sheriff shall satisfy the same out of the property attached by him, if it shall be sufficient for that purpose, by paying over to such plaintiff any attached money, the proceeds of any perishable or other property sold by order of the court, and the proceeds of any debts or credits collected by him, or so much as shall be necessary to satisfy such judgment.

21-17-37. Sale of attached property on execution to satisfy judgment for plaintiff--Certificate to purchaser of corporate stock.--If any balance remain due after the payments required by § 21-17-36, and an execution shall have been issued on such judgment, the sheriff shall proceed to sell, under such execution, so much of the attached property, real or personal, except as provided in § 21-17-39, as may be necessary to satisfy the balance, if enough for that purpose shall remain in his hands; and in case of the sale of any rights or shares in the stock of a corporation or association, the sheriff shall execute to the purchaser a certificate of sale thereof, and the purchaser shall thereupon have all rights and privileges in respect thereto which were had by such defendant.

21-17-38. Repossession by sheriff of property previously attached--Double damages for concealment or withholding.--If any of the attached property belonging to the defendant shall have passed out of the hands of the

sheriff without having been sold or converted into money, such sheriff shall repossess himself of the same, and for that purpose shall have all the authority which he had to seize the same under the attachment; and any person who shall willfully conceal or withhold such property from the sheriff shall be liable to double damages, at the suit of the party injured.

21-17-39. Collection by sheriff of debts seized on attachment--Sale of uncollected debts.--Until the judgment against the defendant shall be paid, the sheriff may proceed to collect the notes and other evidences of debts that may have been seized or attached under the warrant of attachment, and to prosecute any bonds he may have taken in the course of such proceedings and apply the proceeds thereof to the payment of the judgment. At the expiration of six months from the docketing of the judgment, the court shall have power upon the petition of the plaintiff, accompanied by an affidavit setting forth fully all the proceedings which have been had by the sheriff since the service of the attachment, the property attached, and the disposition thereof, and also the affidavit of the sheriff that he has used diligence and endeavored to collect the evidences of debt in his hands so attached, and that there remains uncollected any part or portion thereof, to order the sheriff to sell the same, upon such terms and in such manner as shall be deemed proper. Notice of such application shall be given to the defendant or his attorney, if the defendant shall have appeared in the action. In case the summons has not been personally served on the defendant, the court shall make such rule or order, as to the service of notice and the time of service, as shall be deemed just.

21-17-40. Residue of attached property delivered to defendant.--When the judgment and all costs of the proceedings shall have been paid, the sheriff upon reasonable demand shall deliver over to the defendant the residue of the attached property or the proceeds thereof.

21-17-41. Return of warrant on execution or dissolution.--When the warrant shall be fully executed or dissolved, the sheriff must return the same with the proceedings thereon to the court in which the action was brought.

21-17-42. Cancellation of record of attachment filed with register of deeds--Court order--Direction by plaintiff or attorney.--At any time after a warrant of attachment has been dissolved, the attached property released, or the judgment in the action fully satisfied, the court may, upon the application of any person aggrieved and with or without notice, in the discretion of the court, direct that any notice filed for the purpose of attaching the property be canceled of record by the register of deeds of the county where it is filed or recorded. The cancellation must be made by the register of deeds, upon a certified copy of the order directing such cancellation being filed in his office, by an entry to that effect on the margin of the record referring to the order. Such cancellation may in like manner be made by the register of deeds upon a written request directing such cancellation, signed by the plaintiff or his attorney.

Supreme Court, U.S.
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No. 87-1619

In The

Supreme Court of the United States

October Term, 1987

Norwest Bank Watertown, N.A.
formerly First National Bank of Watertown
Jerry Miller, Vice President of Norwest Bank
Watertown, N.A.; Thomas Green, Attorney for Norwest
Bank Watertown, N.A.,
Appellants,
v.
Watertown Equipment Company and
Edward Moe, Jr.,
Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

1. Whether South Dakota's prejudgment attachments statutes were unconstitutional?

2. Whether an attorney is entitled to qualified immunity when he implemented prejudgment attachment statutes which clearly lacked procedural safeguards required by the Constitution and previously recognized by this Court?

3. Whether an attorney who suggested the use of prejudgment attachment and actively participated in each step of the proceeding is acting under the color of state law for the purposes of § 1983 liability?

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No.

In The

Supreme Court of the United States

October Term, 1987

Norwest Bank Watertown, N.A.
formerly First National Bank of Watertown;
Jerry Miller, Vice President of Norwest Bank
Watertown, N.A.; Thomas Green, Attorney for Norwest
Bank Watertown, N.A.

Appellants.,

v.

Watertown Equipment Company and
Edward Moe, Jr.,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE EIGHTH CIRCUIT

MOTION TO DISMISS OR AFFIRM

For the sake of brevity Appellees incorporate by reference Appellants' Opinions Below, Appendix, and Constitutional and Statutory Provisions. Appellees agree with Appellant Green's JURISDICTION, except Appellees do not agree that jurisdiction is conferred by 28 U.S.C. § 1254(2) (see Argument I herein), nor do they agree that Attorney Green was acting just "at his client's direction."

MOTION OF APPELLEE TO DISMISS OR AFFIRM

Pursuant to Rule 16.1, the Appellees, Watertown Equipment Company and Edward Moe, Jr., move to dismiss the appeal herein or, in the alternative, to affirm the judgment of the United States Court of Appeals for the Eighth Circuit. The motion is grounded on the fact that the questions on which this decision is based are so unsubstantial as not to need further argument.

STATEMENT OF CASE

Appellant Norwest Bank Watertown, N.A. and Appellant Jerry Miller filed a Notice to Appeal herein but neither Appellant has yet to file a jurisdictional statement. This statement of case and the subsequent discussion will deal primarily with Appellant Thomas Green. It is necessary to discuss Appellant Norwest Bank and Miller on occasion simply to give a more appropriate background of the case.

From approximately 1976 until 1982, Defendant/Appellant Norwest Bank Watertown, N.A., (hereinafter "Bank") and Plaintiff/Appellee Watertown Equipment Company (hereinafter "WEC") transacted a series of loans. Plaintiff/Appellee Edward Moe, Jr., (hereinafter "Moe") was WEC's major stockholder. Even though, from time to time, Moe and WEC had trouble meeting their obligations with the bank, the bank had mortgages and security on other major land holdings of the Plaintiff, including real estate, buildings, farm land, car dealership building, etc. The bank and the Plaintiffs enjoyed a close working relationship in attempting to reduce the loans. Daniel Tobin, who was the manager at Watertown Equipment Company, and others made a proposal to purchase the operating part of the company in or about late September, 1982.

Contrary to what Appellant Thomas Green (hereinaf-

ter "Green") has alleged in his jurisdictional statement herein, Tobin signed an affidavit (which was part of the 8th Circuit file) which stated that he never told anyone from the bank that any suspect practices were ever going on at Watertown Equipment company in 1982. In fact, in depositions taken of the primary bank officers, the bank admits that it had no reason to believe suspect practices were going on. The bank never made a written demand on WEC or Moe for immediate payment of the loans and Moe never refused to make payments. The bank never initiated any kind of outside check or investigation concerning either WEC or Moe, nor did the bank ever request a certified audit.

Sometime in early October, attorney Green suggested to the bank that they pursue a prejudgment attachment action against WEC. Prior to the attachment of WEC, the bank was not even aware that such an unusual ex parte remedy existed. Green researched the potential unconstitutionality of South Dakota's attachment statutes and found that other similar prejudgment statutes had been found unconstitutional by various state and federal courts. Green discussed the unconstitutional ramifications with the bank. The bank did not seek another opinion nor did they question further of Green. In addition to his oral communication with the bank, Green delivered to the bank an opinion letter (an unusual move as far as the bank was concerned, since Green had handled other matters for the bank and had not made it a practice to reduce his comments to writing). All the major officials of the bank admitted that they knew about the potential unconstitutionality of South Dakota's attachment statutes, but they agreed with Green to commence this drastic measure. The bank and Green were aware that the prejudgment attachment would cause great and immediate harm to its customers and the Plaintiffs. On October 25, 1982, (1) Green secured a writ from the county Clerk of Courts with no judicial supervision; (2) Green obtained the writ with a

summary (boiler plate) affidavit; (3) no notice was given to Moe or WEC; (4) only a $10,000.00 bond was posted.

Attorney Green and the bank were joint participants, along with the county sheriff, in the attachment procedure. In particular, Defendant Green (1) made the decision to draft the writ of attachment to include a signature line for the Clerk of Courts, rather than using a procedure that would require judicial supervision; (2) delivered the writ to the Clerk of Courts office for filing and execution; (3) delivered the documents to the sheriff to have the attachment put in motion; (4) wrote and delivered a letter to the sheriff, directing him as to how to carry out the attachment; (5) accompanied the sheriff to Watertown Equipment Company when they closed the business and locked the doors; (6) jointly participated with the sheriff in advising the manager of Watertown Equipment Company as to the effect of the attachment and what it was that Green, the bank, and the sheriff were doing; (7) had the idea for attachment and communicated the idea to the bank; (8) researched and knew of the potential unconstitutionality of the statute but advised the bank to act anyway; (9) wrote a letter to the bank about the potential for risk (an unusual step); (10) drew the boiler plate affidavit and the writ of attachment; (11) notarized the boiler plate attachment.

On October 25, 1982, officers of the First National Bank in Watertown along with their lawyer Green, accompanied the sheriff of Codington County and a corps of deputies to the premises of the Watertown Equipment Company. At that time, the sheriff and deputies "attached" all of the real and personal property of Watertown Equipment Company and placed the same under lock and key. The deputies continued to occupy and guard the property for months.

In the attachment process, the sheriff and deputies

secured not only the equipment and real property owned by Watertown Equipment Company, but also the equipment owned by customers; work in process; accounts receivable; money and bank accounts; and hundreds of thousands of dollars of property floor planned by WEC to other implement and supply companies. The company was paralyzed and, of course, destroyed. Contrary to the inference raised in the Appellants' jurisdictional brief, WEC had more equipment in its possession belonging to other dealerships than vice-versa.

Green not only acted as a legal counsel to the bank, he also basically did the sheriff's job for him. It was obvious that the sheriff was only along because Green didn't have a badge. Green even wrote a letter to the bank in which he implied that the local judge would not have the nerve to declare the statute unconstitutional and that Moe and WEC would be forced to appeal if they wanted a declaration of unconstitutionality. Now in his jurisdictional statement, attorney Green expresses surprise at the fact that the courts have ruled that the statute was unconstitutional, and clearly so.

In August of 1984, Moe and WEC brought a 42 USC 1983 action against the bank, one of its officers and Green. In September of 1985, Green moved for and was granted summary judgment by the District Court and in October of 1986 the bank and its officer moved for and were granted summary judgment. On October 8, 1987, the Eighth Circuit Court of Appeals reversed both district court decisions on the summary judgment, holding that the attachment statutes in South Dakota were unconstitutional and, further, that a fact question existed as to whether Green was acting under color of state law. On October 29, 1987, Green petitioned for rehearing and rehearing en banc. On December 23, 1987, the Court of Appeals entered an order denying the petition.

ARGUMENT

I.

SOUTH DAKOTA'S PREJUDGMENT ATTACHMENT STATUTES WERE UNCONSTITUTIONAL.

Appellant Green fails to directly address the issue of whether the attachment statute was unconstitutional. Instead, Green has tried to present the § 1983 qualified immunity issue under the guise of a proper appeal in accordance with §1254(2). Green's failure to candidly address the "State statute held by a Court of Appeals to be invalid as repugnant to the Constitution" subjects him to dismissal as he has failed to properly invoke the jurisdiction of this Court.

The issue that invokes the jurisdiction of this Court under §1254(2) is the Court of Appeals' decision which held South Dakota's attachment statutes unconstitutional. Four cases from this Court have established the guidelines for determining the constitutionality of state prejudgment seizures of debtor's property. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969) (prejudgment garnishment procedure violated the fundamental principles of due process); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (prejudgment replevin statutes unconstitutional); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974) (sequestration statute provided adequate procedural safeguards including judicial supervision); *North Georgia Finishing, Inc., v. Di-Chem, Inc.*, 419 U.S. 601 (1975) (prejudgment garnishment statute unconstitutional due to lack of judicial supervision and prompt postgarnishment hearing).

The Court of Appeals concluded that these four Supreme Court decisions point to five primary factors: (1) an

affidavit which contains facts alleged by a person with knowledge; (2) an opportunity for the debtor to dissolve the writ by posting a bond; (3) an early post-deprivation hearing at which the creditor bears the burden of proving the legality of the writ; (4) indemnification of the debtor for a wrongful attachment; and (5) judicial supervision of the attachment process.[1] The Court of Appeals applied these factors to the South Dakota attachment statutes and determined that the statutes did not provide for judicial supervision or an adequate creditor's bond. The Court held that without these essential procedural safeguards the attachment statutes were unconstitutional.

This Court and lower courts have consistently recognized the importance of active judicial participation to aid in minimizing the improvident use of a writ. *Mitchell*, 416 U.S. at 616-17; *Guzman v. Western State Bank*, 516 F.2d 125, 130-31 (8th Cir. 1975); *Johnson v. American Credit Co.*, 581 F.2d 526, 534-35, n. 16 (5th Cir. 1978). Green creates an imaginary conflict in his discussion of judicial supervision. In the two maritime cases, the courts recognized that maritime needs and requirements differ substantially from those in the commercial context of the *Sniadach* line of cases. Additionally, both courts determined that the maritime prejudgment attach-

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1 These factors were also recognized in *Lewis Service Center, Inc., v. Mack Financial Corp.*, 696 F.2d 66, 68 (8th Cir. 1982), a case decided on December 27, 1982, just a couple of months after the attachment in this case. The district court stated that "had the *Lewis* decision been on the books prior to the action in this case, it's the view of the Court that there probably would be an issue of fact . . . whether . . . Defendant Green knew or should have known that . . . the attachment statute was unconstitutional." The Eighth Circuit believed that earlier cases such as *Guzman v. Western State Bank* and *Mitchell*, which both considered prejudgment attachment, are as or more instructive than *Lewis*, which considered a replevin action under a Nebraska statute.

ment cases presented the "extraordinary situation" referred to in *Fuentes* wherein the attachment was necessary to secure jurisdiction. *Polar Shipping Ltd. v. Oriental Shipping Corp.*, 680 F.2d 627, 640 (9th Cir. 1982); *Schiffahartsgesellschaft Leonhardt & Co. v. A. Bottacchi S.A. de Navegacion*, 773 F.2d 1528, 1537 (11th Cir. 1985) (both cases citing *Fuentes*, 407 U.S. at 91 n. 23).

Green also cites a postjudgment garnishment case in which the issuance of the writ by a court clerk was acceptable as the judgment had been entered. However, the court stated that the lack of judicial review was a "substantial defect." *Brown v. Liberty Loan Corp.*, 539 F.2d 1355, 1369 (5th Cir. 1976), *cert. denied*, 430 U.S. 949 (1977). Lastly, Green mistakenly states that Pennsylvania's foreign attachment statutes were upheld in *Jonnet v. Dollar Savings Bank*, 530 F.2d 1123 (3d Cir. 1976). Actually, the court held that the Pennsylvania procedures provided insubstantial protection to the debtor against wrongful attachment. *Id.* at 1129. The court also stated that judicial participation in the writ process affords a greater opportunity that the requisite determinations for attachment will be made. *Id.* at 1130, n. 15. As can be ascertained from this account of the cases cited by Green, there is not a conflict among the Courts of Appeals which would require this Court's time and attention.

The Court of Appeals found that the creditor's bond provided wholly inadequate indemnification of the debtor in case of a wrongful attachment.[2] Green fails to mention that

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2 Green refers to the common law remedy for wrongful attachment. *Slaughter v. Nolan*, 41 S.D. 134, 169 N.W. 232 (1918). This remedy coexists with the § 1983 action. Further, it is not a substitute for the debtor's right to due process safeguards guaranteed by the Constitution. *See, e.g., Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 934-35 (1982); *Buller v. Buechler*, 706 F. 2d 844, 850-51 (8th Cir. 1983).

the statute only required a maximum bond of $10,000.00. S.D. Codified Laws Section 21-17-4 (1967). Thus, the defendant is only protected from the plaintiff's wrongful attachment for damages up to $10,000.00. By the Bank's own estimate, the property which was attached at WEC had a fair market value of between $275,000 and $300,000. This attachment brought all business at WEC to a "screeching halt" and the attachment was maintained on the property for several months. (Jur. A-15). Clearly, this bond falls painfully short of the constitutional safeguard of assuring that the "prevailing party is protected against all loss." *Mitchell*, 416 U.S. at 619.

The Court of Appeals also correctly found that the post-deprivation hearing and the posting of a debtor's bond were inadequate safeguards which did not make up for the lack of other crucial safeguards. The Court noted that even if WEC had immediately requested a hearing, the damages for the loss of business, harm to reputation, and attorney's fees would have far exceeded the $10,000 creditor's bond. Further, the debtor's bond requirement was a meaningless protection as it required the debtor to pay plaintiff on demand the amount of any judgment which for WEC would have been $488,000. How could WEC post a bond when Green and Norwest had all of his property locked up?

The Court of Appeals properly held that the South Dakota attachment statutes were unconstitutional. The decision follows this Court's own prior case law. The Court of Appeals merely adopted and applied the guidelines set forth by this Court over ten years ago. Subsequently, these factors have been implemented by the lower courts and have successfully stood the test of time.

Finally, it is significant to note that the attachment statutes involved in this appeal were repealed by the South Dakota legislature in 1983 and the replacement statutes are

not at issue. Therefore, this solitary case, dealing with a since repealed statute, is not likely to recur and, as such, is not of significant importance to warrant this Court's attention.

II.

AN ATTORNEY IS NOT ENTITLED TO QUALIFIED IMMUNITY WHEN HE IMPLEMENTED PREJUDGMENT ATTACHMENT STATUTES WHICH CLEARLY LACKED PROCEDURAL SAFEGUARDS REQUIRED BY THE CONSTITUTION AND PREVIOUSLY RECOGNIZED BY THIS COURT.

In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), this Court noted the problem of holding private individuals liable for invoking seemingly valid, but consitutionally infirm, state laws. The majority and the dissent agreed that a possible solution would be the availability of a qualified immunity defense. *Id.* at 942 n. 23, 956 n. 14. Since that time at least three Courts of Appeals have followed the suggestion of this Court and have held that such immunity exists for private parties. *Buller v. Buechler*, 706 F.2d 844 (8th Cir. 1983); *Folsom Investment Co. v. Moore*, 681 F.2d 1032 (5th Cir. 1982); *Jones v. Preuit & Mauldin*, 808 F.2d 1435 (11th Cir. 1987). To gain the protection of qualified immunity, the defendant must show that he did not violate clearly established law of which he knew or should have known. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

The Court of Appeals applied this objective test and reviewed well-settled case law on prejudgment procedures. The Court found that an entire business was permanently closed and property valued at several hundred thousand dollars was taken by a process which did not proceed under judicial management and which did not provide an adequate

bond for the protection of the debtor. The Court then reached the only fair and correct conclusion— "This procedure clearly was not constitutionally acceptable in 1982 when the attachment in this case occured." (Jur. A-17)

III.

AN ATTORNEY WHO SUGGESTED THE USE OF PREJUDGMENT ATTACHMENT AND ACTIVELY PARTICIPATED IN EACH STEP OF THE PROCEEDING IS ACTING UNDER THE COLOR OF STATE LAW FOR THE PURPOSES OF SECTION 1983 LIABILITY.

The Court of Appeals held that the determination of whether Green acted under color of state law was a factual question to be decided on remand. Obviously, the color of state law issue raised by Green on this appeal depends on the particular facts of this case alone and is of interest only to the parties in this action. Essentially, Green is asking this Court to make the factual determination on an issue that was properly remanded by the Court of Appeals.[3]

In implementing the use of an attachment statute which was clearly unconstitutional, Green went far beyond "merely advising his client and instituting proceedings at the client's direction." The idea of a prejudgment attachment originated with Green. Thereafter, he participated in every

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3 Green asserts that this issue was not raised or addressed in his brief. A party must be acting under color of state law to be a proper defendant for a §1983 action; thereafter, the defendant is entitled to assert the affirmative defense of qualified immunity. *Buller*, 706 F.2d at 850. By failing to address this issue and asserting and briefing the affirmative defense of qualified immunity, Green has possibly waived this inquiry and made an admission that he was acting under the color of state law.

step of the procedure including: writing and delivering a letter to the sheriff explaining how to carry out the attachment; accompanying the sheriff to WEC when they closed the business and locked the doors; and assisting the sheriff in explaining to the manager of WEC the effect of the attachment. In summary, Green's joint participation far exceeded that of the defendants in *Lugar*. Green engaged in joint activity with the State and its agents to secure the application of a state law so "plainly unconstitutional as to enjoy no presumption of validity." *Lugar*, 457 U.S. at 955 (Powell, J. dissenting).

Additionally, Green is attempting to create an "open and unanswered" question of an issue which has already been addressed by this Court. In previous cases, this Court has held that private parties are amenable to suit under Section 1983 when acting in "joint participation" or "conspiracy" with state officials in the violation of constitutional rights. *See, e.g., Adickes v. S. H. Kress Co.*, 398 U.S. 144, 152-53 (1970); *United States v. Price*, 383 U.S. 787, 794 (1966). This Court has explicity noted that in the case of prejudgment attachment the test is a private party's "joint participation" with state officials in the seizure of disputed property. *See Lugar*, 457 U.S. at 939-42; *Flagg Brothers Inc., v. Brooks*, 436 U.S. 149, 157 (1978). The Court of Appeals correctly adopted this standard as follows: "In attachment proceedings and other cases, as the Supreme Court established in *Lugar*, the key is 'joint participation' with state officials in depriving someone of his or her constitutional rights." (Jur. A-22). Thereafter, the Court of Appeals remanded the factual question for consideration at the district court level.

The "joint participation" test adequately protects an attorney who is simply performing a lawyer's traditional function as counsel. *See, e.g., Polk v. Dodson*, 454 U.S. 312, 325

(1981). This test also fairly determines when a private party, including an attorney, is a willful participant in joint activity with the State or its agents.[4] Green seems to urge that an attorney is entitled to a special test in this narrow situation. It is clear that an attorney is a private party and special treatment in the form of yet another "test" to determine color of state law is not only unnecessary in light of this Court's decisions, but would also unduly complicate and confuse this area of the law.[5]

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4 Contrary to Green's belief (Jur. p. 16), the court in *Buller v. Buechler*, 706 F.2d 844 (8th Cir. 1983) implemented the "joint participation" test to determine that the defendants, including attorney Buechler, were acting under color of state law. *Id.* at 849-50.

5 The *Lugar* court noted that a number of different factors or tests already existed for this fact-bound inquiry. *Lugar*, 457 U.S. at 939.

CONCLUSION

For the foregoing reasons, Appellees respectfully move the Court to dismiss the appeal, or, in the alternative, to affirm the judgment entered by the United States Court of Appeals for the Eighth Circuit.

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